Filed 11/16/10 Telford v. Sagewood Homeowners Assn. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TED TELFORD et al., Plaintiffs and Appellants, v. SAGEWOOD HOMEOWNERS ASSOCIATION, INC. et al., Defendants and Respondents.	E048483 (Super.Ct.No. RIC471747) OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge. Affirmed in part, reversed in part with directions.

Law Offices of William R. Jaymes, William R. Jaymes and Jessica A. Albert for Plaintiffs and Appellants.

Peters & Freedman, Simon J. Freedman and Laurie F. Masotto for Defendants and Respondents.

Ted Telford and William Hubbard (plaintiffs) appeal from a judgment of dismissal entered after the court sustained a demurrer to the fifth, sixth, seventh and eighth causes

of action in their third amended complaint, without leave to amend, with respect to defendants Sagewood Homeowners Association, Inc. and Ed Dietrich. We reverse the judgment as to the homeowners' association, but we affirm the judgment as to Ed Dietrich.

FACTUAL AND PROCEDURAL HISTORY

In reviewing a judgment following an order sustaining a demurrer without leave to amend, we treat the demurrer as admitting all material facts properly pleaded. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) Consequently, the following facts, unless otherwise noted, are drawn from the third amended complaint and are treated as true.

Plaintiffs own and reside in a condominium within the Sagewood Homeowners Association (the HOA). Daniel Lass, the owner of two condominiums neighboring plaintiffs' unit, sought the approval of the HOA's board of directors to combine his two units into a single unit. The plans Lass submitted included converting a carport into a closed garage and the conversion of approximately 1,000 square feet of common area to Lass's exclusive use.

Lass submitted his architectural variance request and preliminary plans to the HOA in December 2005. The architectural committee reviewed the request and deemed it to be pending, "absent submission of final construction documents/plans, proof of notification and discussion of the project by Lass with his neighbors including

[plaintiffs], and other conditions precedent to project approval." (Capitalization normalized.)

At a board meeting on February 4, 2006, the HOA granted preliminary or conditional approval of the project. The conditional approval set forth a number of conditions which Lass was required to meet before he could obtain final approval. These conditions included board approval of final construction drawings and city building permits; deposit of a $5,000 performance bond; development of a procedure for notification to neighbors, including plaintiffs, of final approval of the project, the beginning date of construction and subsequent interruptions in utility service; execution of a maintenance and hold harmless agreement before the start of construction; and a requirement that the common area Lass sought to convert to his separate use be valued and the sale of the area be submitted to a vote of the membership, requiring approval of at least 67 percent of the membership. None of these conditions was met before the start of construction, and the HOA did not seek to verify that the conditions had been met. And, rather than having the common area appraised and the question of its sale to Lass voted on by the members, the HOA simply "gifted" the common area to Lass.

On April 8, 2006, the HOA adopted its "Architectural Improvement Guidelines." The guidelines were intended to clarify the provisions of the covenants, conditions and restrictions (CC&R's) with respect to the process for approving and carrying out improvement projects. Also on April 8, 2006, the board held a special meeting to consider Lass's project. At that meeting, Lass and the HOA agreed to plaintiffs' request

that no work audible outside Lass's units be conducted before 8:00 a.m. or after 5:00 p.m. and that there be no work at all on weekends. Lass assured plaintiffs that the project would take no more than six months to complete.

Rather than the six months Lass promised, the project took nearly two years to complete, and plaintiffs were subjected to the noise, fumes, dust and inconvenience of the construction not only between 8:00 a.m. and 5:00 p.m. on weekdays, but during evening hours and on weekends and some holidays. They informed the HOA "on numerous occasions of the disruptive nature of Lass's project," but the HOA failed to intervene. In addition, the project as completed varied materially from the plans which were preliminarily approved. The HOA never finally approved the project, nor did it verify that Lass obtained a city permit.

In May 2007, plaintiffs sued Lass and the HOA for damages they allegedly incurred as a result of what was then an ongoing construction project which, they alleged, had caused them the loss of quiet enjoyment of their property and physical and emotional harm. They sued Lass on theories of public and private nuisance, intentional and negligent infliction of emotional distress, and negligence in the manner in which he conducted the construction project.[1] They sued the HOA for negligence, contending that it failed to adequately evaluate the proposed project for compliance with the HOA's governing documents, including provisions prohibiting any actions within the community

[1] Lass apparently filed an answer to the operative complaint; he is not a party to this appeal.

which unreasonably interfered with any resident's right to quiet enjoyment or which may endanger the health of another resident or which may unreasonably annoy or disturb other residents or amount to a nuisance. They alleged that the approval of the project was "not only negligent, but was unreasonable, arbitrary, and in bad faith" and that it resulted from the "close personal relationship" between Lass and one or more board members. They also sued the HOA for breach of its governing documents and breach of fiduciary duty, based on the same facts alleged under the negligence cause of action.

The HOA's demurrers to the original complaint and to the first and second amended complaints were sustained with leave to amend in some respects and without leave in others.[2]

On October 3, 2008, plaintiffs filed their third amended complaint (the TAC). In the TAC, they added a third named defendant, Ed Dietrich, who, they alleged, was president of the HOA's board of directors at all relevant times. Although the factual allegations were somewhat different, reflecting events which had transpired during the

---

[2] On September 15, 2008, the trial court sustained the demurrer to the seventh cause of action, for breach of fiduciary duty on the part of the HOA, in plaintiffs' second amended complaint, without leave to amend. Plaintiffs realleged the seventh cause of action in the third amended complaint. Although defendants do not make an issue of it, they state in the "procedural background" section of their brief that the previous order precluded plaintiffs from realleging breach of fiduciary duty by the HOA in the third amended complaint. However, it is proper, although unnecessary, to reallege a "dead" cause of action—i.e., one as to which a demurrer was sustained without leave to amend—in a future amended complaint, in order to preserve the right of review concerning the validity of the cause of action. (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 44-45.) The ruling sustaining the demurrer as to that cause of action without leave to amend is reviewable in this appeal. (Code Civ. Proc., § 472c, subds. (b), (c).)

year and a half since the original complaint was filed, plaintiffs' theories of liability were essentially the same. The TAC added an eighth cause of action against Dietrich, for breach of fiduciary duty. Plaintiffs alleged that Dietrich improperly put his personal and business relationship with Lass above his duties to the homeowners in approving Lass's project and in failing to control the project, thus subjecting them to the nuisance which resulted.

The HOA and Dietrich (collectively defendants) demurred, contending that the fifth, sixth and seventh causes action failed to state causes of action as to the HOA and that the eighth cause of action failed to state a cause of action against Dietrich. (We discuss the demurrer in more detail below.) The trial court sustained the demurrer without leave to amend. Judgment of dismissal as to the HOA and Dietrich was entered, and plaintiffs filed a timely notice of appeal.

LEGAL ANALYSIS

THE FIFTH, SIXTH AND SEVENTH CAUSES OF ACTION ADEQUATELY STATE CAUSES OF ACTION

In an appeal from a judgment based on an order sustaining a demurrer for failure to state a cause of action, the reviewing court treats the demurrer as admitting all material facts properly pleaded and independently determines whether the complaint states a cause of action under any legal theory. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 38.) If the complaint does not adequately state a

cause of action, the reviewing court may grant leave to amend if there is a reasonable probability that the complaint can be amended to state a cause of action, even if the plaintiff has not sought leave to amend. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746; Code Civ. Proc., § 472c, subd. (a).)

A homeowners' association has a duty to enforce its governing documents, and it must exercise any discretionary function in a manner consistent with its fiduciary duty to the homeowners.

The fifth, sixth and seventh causes of action, for negligence, breach of the HOA's governing documents and breach of fiduciary duty, respectively, are all based on the same premise: that the HOA had a duty to plaintiffs to act in good faith and with reasonable prudence in approving Lass's construction project, and that it had a duty to ensure that Lass carried out the project in a manner which complied with the HOA's governing documents and its agreements with plaintiffs and did not amount to a nuisance in violation of the CC&R's. Plaintiffs allege that the project was approved only because of Lass's close relationship with Dietrich and imply, at least, that the HOA did not act in good faith because it was unduly influenced by Dietrich's relationship with Lass and that it did not respond to plaintiffs' complaints about the nuisance caused by the construction project for the same reason.

Defendants contend, among other things, that the HOA had sole discretion to determine whether to approve Lass's construction project, that it had no duty to monitor the project once it was approved, and that it has sole discretion to determine how or

whether to enforce the provisions of its governing documents. Although defendants are correct that discretionary decisions of the board of directors of a homeowners' association with respect to maintenance of the property and its other functions are granted deference under a version of the "business judgment rule," deference is accorded only if the association has acted "upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members." (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265 (*Lamden*).) Here, the gravamen of plaintiffs' causes of action is that the HOA did *not* act reasonably or in good faith. Accordingly, we examine the sufficiency of the TAC from that perspective.

Plaintiffs have alleged that the HOA failed to enforce various provisions of its governing documents. Civil Code section 1354 provides that the covenants and restrictions in the declaration of CC&R's of a common interest development are enforceable as equitable servitudes, and that they "inure to the benefit of and bind" all owners of separate interests in the development. (Civ. Code, § 1354, subd. (a).) "Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both." (*Ibid.*) Consequently, when an association fails or refuses to enforce its CC&R's, "a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration." (*Lamden, supra,* 21 Cal.4th at p. 268.) An owner also has the right to compel the association to enforce its other governing documents: "A governing

document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association."[3] (Civ. Code, § 1354, subd. (b).) Here, neither the declaration of CC&R's nor the architectural guidelines states that it may be enforced only by the HOA. Accordingly, plaintiffs, as owners, have a right to compel the HOA to enforce their provisions or to seek damages for the HOA's failure to do so. (*Lamden*, at p. 268.)

Plaintiffs have adequately alleged that the HOA acted negligently or in bad faith by failing to require Lass to comply with provisions of the governing documents affording other homeowners protection from nuisance arising from a home improvement project.

As plaintiffs have alleged, the architectural guidelines do require the HOA to ascertain that a project complies with the plans as approved.[4] The guidelines also limit construction to the hours of 8:00 a.m. to 5:00 p.m. Monday through Saturday, excluding holidays. And, they provide that all owners "have a right and responsibility" to call all violations of the CC&R's and architectural guidelines to the attention of the HOA, via its management company, and provide for remedies for violations. Consequently, failure to

---

[3] Governing documents are any documents which govern the operation of the association. (Civ. Code, § 1351, subd. (j).) This includes the HOA's architectural guidelines.

[4] Defendants state, in passing, that since the architectural guidelines were not adopted until April 2006, after (according to defendants) Lass's project was approved, the guidelines do not apply to his project. Plaintiffs, however, allege that Lass's project was not finally approved until after the guidelines were adopted. The applicability of the guidelines is therefore a factual dispute which cannot be determined in the context of a demurrer. We must assume the truth of plaintiffs' factual allegations. (See *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 496, fn. 2.)

monitor a project for compliance with the plans and/or with the guidelines or to investigate complaints that the project is not in compliance, as plaintiffs alleged, is a breach of the HOA's duty pursuant to the guidelines. Further, the CC&R's prohibit activities which interfere with the right of owners to the quiet enjoyment of their properties and provide for remedies for the breach of the CC&R's, the bylaws and the "Rules and Regulations of the Association." Accordingly, the TAC states causes of action for negligence and failure to enforce the governing documents with respect to the HOA's failure to take action to require Lass to comply with the architectural guidelines and to refrain from actions which amounted to a nuisance. And, because a homeowners' association stands in a fiduciary relationship with the member homeowners (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 651 [Fourth Dist., Div. Two] (*Kite Hill*)), the TAC states a cause of action for breach of fiduciary duty by the HOA based on these allegations as well.

However, neither the CC&R's nor the architectural guidelines require the HOA to take legal action, i.e., to seek to enjoin Lass's conduct which is in violation of the CC&R's or the architectural guidelines, as plaintiffs alleged. Rather, the guidelines state that remedies for improvements which are "installed without Association approval or which are installed contrary to approved plans . . . will be pursued to the fullest extent permitted by the CC&Rs and the law." Remedies include but are not limited to violation letters, a hearing before the HOA board of directors, legal action, and fines and assessment of the cost of removal of the offending improvement. Similarly, although the

CC&R's provide that the failure of any owner to comply with the CC&R's, the bylaws or the rules and regulations of the HOA "shall be grounds for an action to recover sums due, for damages, or for injunctive relief, or for any other remedy permitted by law or permitted by the terms of this Declaration," they do not mandate any particular remedy.

Homeowners' associations are generally afforded broad discretion to determine the best means to exercise their obligations under the governing documents, such as to perform maintenance and repair (*Lamden*, *supra*, 21 Cal.4th at p. 265) or to enforce provisions of their governing documents (*Haley v. Casa Del Rey Homeowners Assn*. (2007) 153 Cal.App.4th 863, 875). That discretion is limited by the requirement that the association must act within the scope of its authority under the governing documents and "upon reasonable investigation, in good faith and with regard to the best interests of the community association and its members." (*Lamden*, at p. 265.) Here, the architectural guidelines clearly provide that the determination as to which of several enumerated remedies to pursue is within the HOA's discretion, and the CC&R's imply as much. Consequently, the HOA's failure to take legal action to enjoin Lass's project does not constitute a breach of duty under the guidelines or the CC&R's. It is clear, however, that the HOA had a duty to undertake a reasonable investigation into plaintiffs' complaints that Lass was violating the guidelines or the CC&R's and to determine, in good faith, whether a remedy was called for and if so, which remedy to apply. On remand, plaintiffs may amend their complaint accordingly.

Plaintiffs have adequately alleged that the HOA acted in bad faith with respect to the approval of Lass's project.

Defendants are correct that a homeowners' association has broad discretion to grant or withhold consent to an owner's proposed construction or improvement project if the CC&R's grant such discretion. (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 977.) However, "It is a settled rule of law that homeowners' associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions" and that they must do so in good faith, consistent with their fiduciary obligations to the homeowners. (*Kite Hill*, *supra*, 142 Cal.App.3d at pp. 650, 651; see also *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 383.) Here, the CC&R's and the architectural guidelines require the HOA to exercise discretion in deciding whether to approve any project and in deciding what, if any, conditions to impose upon the project. Plaintiffs' allegation that the HOA did not act in good faith in approving Lass's project and/or in failing to require Lass to comply with conditions it imposed on the project because of his special relationship with Dietrich is sufficient to allege a cause of action for breach of the governing documents and breach of fiduciary duty.[5] (See *Kite Hill*, at p. 652.)

---

[5] In the introductory portion of their brief, defendants assert that the TAC is flawed because in that version of the complaint, plaintiffs alleged that the HOA conditionally approved Lass's project, while in earlier versions they alleged that the HOA approved the project. Defendants do not, as far as we are aware, rely on this variance as a ground for sustaining the demurrer. In any event, we do not view this as a material

[footnote continued on next page]

The exculpatory clause in the CC&R's does not, as a matter of law, defeat plaintiffs' claims.

Defendants also contend that the CC&R's expressly exempt the HOA and the directors from liability for any damage resulting from the approval of any construction plans or the performance of any work whether or not pursuant to approved plans.[6] This exculpatory clause cannot be reconciled with the HOA's fiduciary duty to the property owners.

As this court observed in *Kite Hill*, "The law has traditionally viewed with disfavor attempts to secure insulation from one's own negligence or wilful misconduct[.]" (*Kite Hill*, *supra*, 142 Cal.App.3d at p. 654.) "Furthermore, it is the express statutory policy of this state that '[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' (Civ. Code, § 1668.)" (*Kite Hill*, at p. 654.) "This public policy applies with added force when the exculpatory provision purports to

---

[footnote continued from previous page]
variance which would support a demurrer unless plaintiffs are able to plead around it. (See *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)

[6] The clause provides, "Neither the Board, Committee nor any Member thereof shall be liable to the Association, any Owner, or to any other party, for any damage, loss or prejudice suffered or claimed on account of (a) the approval or disapproval of any plans, drawings, or specifications, or (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings and specifications; provided that with respect to the liability of a Member, such Member has acted in good faith on the basis of actual knowledge possessed by him or her."

immunize persons charged with a fiduciary duty from the consequences of betraying their trusts." (*Ibid*.) Moreover, "the California Supreme Court has evinced a clear policy of enforcing only those exculpatory provisions which do not affect 'the public interest.'" (*Kite Hill*, at pp. 654-655, citing *Tunkl v. Regents of the University of California* (1963) 60 Cal.2d 92, 96.) Applying the Supreme Court's criteria for determining whether a business or transaction affects a public interest, we concluded that the exculpatory clause did not relieve the homeowners' association from liability for breach of its fiduciary duties because it occupied "a particularly elevated position of trust" due to its quasi-governmental status and "the many interests it monitors and services it performs." (*Kite Hill*, at pp. 651, 655; accord, *Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 56 [for purpose of determining effectiveness of exculpatory clause, breach of fiduciary duty constitutes willful injury to the property of another within the meaning of Civil Code section 1668].) For these reasons, the exculpatory clause in the CC&R's cannot insulate defendants from liability if, as plaintiffs have alleged, the HOA approved Lass's plans in bad faith, based on Lass's relationship with Dietrich, or if it failed in its fiduciary duty to protect plaintiffs from the effects of Lass's construction.

At oral argument, the HOA contended that we should apply *Nahrstedt v. Lakeside Village Condominium Assn., supra*, 8 Cal.4th 361, rather than *Kite Hill* to determine the effectiveness of the exculpatory clause. We disagree. In *Nahrstedt*, the court held that covenants in common interest development CC&R's which restrict an owner's use of his or her property are "'enforceable . . . unless unreasonable.'" (*Nahrstedt*, at p. 380 [italics

omitted], quoting Civ. Code, § 1354, subd. (a).) The exculpatory clause is not a restrictive covenant affecting an owner's use of his or her property. Rather, it affects the association's fiduciary relationship with the owners. Accordingly, *Kite Hill* is the relevant authority.

The demurrer cannot be sustained based on plaintiffs' alleged failure to show that defendants' acts or omissions were a substantial factor in causing their damages.

Defendants also contend that even if all of plaintiffs' allegations are true, the TAC failed to show that any action or inaction on its part was a substantial factor in plaintiffs' damages, since plaintiffs admitted that it was Lass's ongoing construction activities which caused the nuisance and therefore caused plaintiffs' alleged damages. This is incorrect.

A substantial factor in causing harm is "a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor[, but it] does not have to be the only cause of the harm. [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (CACI No. 430; see *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969.) A homeowners' association's breach of its fiduciary duty to enforce its governing documents may indeed be a substantial factor in causing damages alleged to have resulted from a neighboring owner's construction project. (*Kite Hill, supra,* 142 Cal.App.3d at p. 653.) Here, if the HOA had not approved Lass's project or if it had taken action to limit the impact of Lass's project, plaintiffs would not have suffered the

harm they alleged. Consequently, even though it was the project itself which caused plaintiffs' injuries, we cannot say as a matter of law that the HOA's conduct, as alleged, was not a substantial factor.[7]

Emotional distress damages are available for breach of fiduciary duty.

Defendants also contend that damages for emotional distress are not available for breach of contract. However, breach of fiduciary duty is a tort. (*Enea v. Superior Court* (2005) 132 Cal.App.4th 1559, 1566-1567, and cases cited therein.) Damages for emotional distress are available for such a claim. (*Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 406.)

Conversion of common area to Lass's individual use.

Plaintiffs allege that the HOA breached its duties to the homeowners when it permitted Lass to convert a common area to his own use without obtaining the approval of 67 percent of the owners. They allege that the HOA conditioned approval of the grant of the common area to Lass on the approval of 67 percent of membership "in conformity with the Davis-Stirling Act"[8] and then acted contrary to that condition. Defendants pointed out in their demurrer that Civil Code section 1363.07, which generally requires

---

[7] The trial court held that plaintiffs failed to provide any authority that the HOA is liable for the acts of a homeowner. However, the complaint does not allege that the HOA is liable for Lass's acts; it alleges that the HOA is liable for failing in its duties to control Lass's violations of the CC&R's and architectural guidelines and for failing to enforce the applicable provisions of the governing documents and agreements made for plaintiffs' benefit.

[8] This reference is to the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.), which governs common interest developments.

approval of at least 67 percent of the membership in order for the directors of a common interest development to grant exclusive use of a common area to any member did not become effective until July 1, 2006, after the date the HOA approved the project. (Civ. Code, § 1363.07, subd. (a); see Historical and Statutory Notes, 8 West's Ann. Civ. Code (2007 ed.) foll. § 1363.07, p. 248.) Plaintiffs acknowledge as much, but assert in their opening brief that the board was aware that Civil Code section 1363.07 had been enacted and chose to apply its provisions to Lass, even though the statute was not yet in effect.

Plaintiffs do not address defendants' argument that Civil Code section 1363.07, subdivision (a) would not apply in any event because the bylaws allow the HOA, by a majority vote of the board, to "[g]rant easements to Owners with a value of more than five percent (5%) of the budgeted gross expenses of the Association for that fiscal year." According to the document entitled "Agreement and Covenant Running with the Land," the board voted to grant two easements to Lass, neither of which had a value in excess of five percent of the HOA's budgeted gross expenses for that fiscal year. If, however, as plaintiffs allege, the board voted to submit the question of granting Lass's easements to a vote of the membership and conditioned its approval of the grant on the approval of 67 percent of membership, the TAC adequately alleges that the HOA breached its fiduciary obligations by failing, in bad faith, to obtain membership approval prior to granting the easements.

THE DEMURRER WAS PROPERLY SUSTAINED AS TO THE EIGHTH CAUSE OF ACTION

Plaintiffs' eighth cause of action alleges breach of fiduciary duty on the part of Ed Dietrich, who, they alleged, was the president of the HOA's board of directors at all relevant times. Dietrich contends that the cause of action cannot be maintained because plaintiffs failed to comply with Code of Civil Procedure section 425.15.

As pertinent, Code of Civil Procedure section 425.15 provides:

"(a) No cause of action against a person serving without compensation as a director or officer of a nonprofit corporation described in this section, on account of any negligent act or omission by that person within the scope of that person's duties as a director acting in the capacity of a board member, or as an officer acting in the capacity of, and within the scope of the duties of, an officer, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes that claim to be filed after the court determines that the party seeking to file the pleading has established evidence that substantiates the claim. . . . [¶] . . . [¶]

"(e)(1) This section applies only to officers and directors of nonprofit corporations that are subject to Part 2 (commencing with Section 5110), Part 3 (commencing with Section 7110) . . . ."

The HOA was organized pursuant to the California Nonprofit Mutual Benefit Corporation Law (Corp. Code, § 7110 et seq.), and its officers and directors serve without compensation. Consequently, if Code of Civil Procedure section 425.15 applies,

plaintiffs were required to obtain the court's permission before filing the complaint as to Dietrich. Code of Civil Procedure section 425.15 does not apply, however, because the TAC does not allege that Dietrich acted negligently in carrying out his duties as a director or officer of the HOA; rather, it alleges that he breached his fiduciary duty of good faith and fair dealing by placing his financial and personal interests above the interests of the HOA and of the homeowners and that he did so "in willful, malicious, oppressive, conscious, and reckless disregard for his fiduciary duties owned [*sic*] to Plaintiffs and other homeowners." Consequently, the demurrer was improperly sustained on the basis of Code of Civil Procedure section 425.15.

Nevertheless, the demurrer was properly sustained because, although the complaint alleges in passing that Dietrich had a duty to act in the best interest of the HOA, the gravamen of the complaint is that Dietrich breached his "fiduciary duty of good faith and fair dealing" by placing his interest in his friendship and financial relationship with Lass ahead of his duty to ensure that the homeowners were not subjected to a project which unreasonably interfered with their right to quiet enjoyment. A director of a homeowners' association owes a duty of due care and undivided loyalty to the association, not to the individual homeowners. (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at p. 513.) Accordingly, no cause of action lies against a director for damages suffered by an individual homeowner on a theory of breach of fiduciary duty.

COSTS ON APPEAL MAY BE AWARDED

At oral argument, the HOA contended that an award of costs on appeal is inappropriate because this is an interim appeal and it cannot yet be determined which party will prevail in the litigation. The HOA is partially correct: Plaintiffs are entitled to their costs on appeal, but the cost award may not include an award of attorney fees.[9] In *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, on which the HOA relies, the court held that a plaintiff which prevails in an interim appeal following entry of a summary judgment is entitled to costs on appeal, but that the cost award excludes contractual attorney fees which might otherwise be awarded to the plaintiff as the prevailing party. A plaintiff's entitlement to attorney fees must, instead, be determined after trial. (*Id.* at pp. 960-963; accord, *Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 805-808.) The same rule applies here. With respect to the HOA, plaintiffs are entitled to their costs on appeal, but they may not recover attorney fees as costs at this juncture, pending determination of which party ultimately prevails in the litigation. (See Code Civ. Proc., § 1034; Cal. Rules of Court, rule 8.278(a)(1), (a)(2), (d).)

With respect to Dietrich, however, our affirmance of the judgment of dismissal of the eighth cause of action will result in a final judgment in his favor. Consequently,

---

[9] The CC&R's provide that if either the HOA or an owner commences litigation to enforce any provision of the CC&R's, the prevailing party shall be entitled to "actual attorney fees and costs reasonably incurred."

there is no bar to his recovery of attorney fees as an item of costs on appeal. (See Cal. Rules of Court, rule 8.278(d).)

DISPOSITION

The judgment of dismissal as to the eighth cause of action is affirmed. Defendant Ed Dietrich is awarded costs on appeal.

The judgment is reversed as to the fifth, sixth and seventh causes of action. Upon remand, the trial court is directed to allow plaintiffs 30 days to amend their complaint as stated herein.

Plaintiffs Ted Telford and William Hubbard are awarded costs on appeal, to be paid by Sagewood Homeowners Association, Inc.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Miller
J.